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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B5

DATE: AUG 29 2012 Office: NEBRASKA SERVICE CENTER

FILE:

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the director.

The petitioner is a global consulting and IT services business. It seeks to employ the beneficiary permanently in the United States as a project manager. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage in 2007. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 31, 2008 and August 5, 2008 denials, the primary issue in this case is whether the petitioner has the ability to pay the proffered wage to the beneficiary in 2007 and continuing until the beneficiary obtains lawful permanent residence.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the

form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on August 21, 2007. The proffered wage as stated on the Form ETA Form 9089 is \$41.38 per hour (\$86,070.40 per year). The ETA Form 9089 states that the position requires a bachelor's degree in science, computer science, MIS, CIS, math, physics, business administration, or engineering and 60 months of experience in the job offered or in an alternate occupation, project leader.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997 and that it currently employs seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on September 6, 2007, the beneficiary claims to have been employed by the petitioner from March 12, 2007 to March 13, 2008. The beneficiary also indicated on the ETA Form 9089 that his current address was 8410 W Superior Avenue, Tolleson, Arizona 85353.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

The priority date in the instant case is August 21, 2007 and the proffered wage is \$86,070.40. As evidence of wages paid to the beneficiary, the petitioner provided a copy of a Form W-2 that indicated \$57,644.00 was paid to the beneficiary in 2007. USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs. The petitioner submitted as evidence a copy of the IRS Form W-2, Wage and Tax Statement for 2007, payroll register for November and December of 2007, and payroll checks and accompanying paystubs for August through December of 2007. The prorated proffered wage from the priority date to the end of 2007 is \$31,126.00 (132 days). The payroll evidence in the record shows that the beneficiary was paid \$31,791.00 after the priority date in 2007. Although the director determined that the wages paid to the beneficiary did not appear on the petitioner's quarterly wage and withholding report for 2007, it is noted that the paystubs and checks issued to the beneficiary list an Arizona address, where more likely than not his wages will be reported. The absence of the beneficiary on the California wage reports does not appear to be an inconsistency which undermines the credibility of the payroll evidence.

Upon review of the record, the AAO has determined that the petitioner has overcome the director's decision that the petitioner does not have the ability to pay the proffered wage in 2007. However, the petition may not be approved, as the petitioner has failed to demonstrate that it has the ability to pay the proffered wage to the beneficiary beginning in 2008 to the present. Furthermore, it does not appear from the record of proceeding that the director examined this issue. Thus, the director's decision will be withdrawn and the petition will be remanded in order for the director to address whether the petitioner has established its ability to pay the proffered wage from 2008 to the present. It is noted that the record shows that the petitioner has *multiple, simultaneously pending petitions*, and must demonstrate its ability to pay the proffered wage for all beneficiaries.

Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore, the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.